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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN P. MCDERMOTT, JR.,

Petitioner,

—VS.—

ARTHUR TATE, JR., SUPERINTENDENT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Where a state statute entitled "Requirements for criminal liability" and applicable generally to the state's entire criminal code expressly provides, inter alia, that "a person is not guilty of an offense" unless the conduct which formed the predicate for the offense charged was a "voluntary act" as defined in the statute and where in a prosecution for murder brought against petitioner in that state, the petitioner bases his defense of not guilty upon a claim that his conduct was not voluntary within the meaning of that statute but rather was the product of a temporal lobe epileptic seizure, and introduces substantial probative evidence to support his claim, is it a denial of the petitioner's Sixth and Fourteenth Amendment rights to due pro-

cess and a jury trial for the state trial court, over petitioner's objection, to refuse to instruct the jury that one of the elements of the offense which the prosecution must prove beyond a reasonable doubt is that the petitioner's conduct was voluntary?

II.

Where, on direct appeal from petitioner's conviction in such a case, the state court of appeals concedes that the statute upon which petitioner's defense of not guilty was based ". . . codifies the fundamental distinction between criminal conduct on one hand and innocent conduct or accident on the other" but, nevertheless, declares that the statute does not define an essential element of the offense with which petitioner was charged, is the concession by the state court of appeals sufficient as a matter

of federal constitutional law under the due process and jury trial clauses of the Sixth and Fourteenth Amendments to compel the conclusion that it was constitutional error for the state trial court to refuse to instruct the jury that the prosecution had to prove beyond a reasonable doubt that petitioner's conduct was voluntary?

III.

Where, in such a case, the state court of appeals' determination that a voluntary act is not an element of criminality in the state is completely contrary to the express language of the state statute on which petitioner based his defense of not guilty, should the federal court of appeals, on habeas corpus review of petitioner's conviction, have rejected the conclusion of the state court of appeals and held that the plain

language of the statute makes a voluntary act an element of every offense in the state and that the petitioner was denied his Sixth and Fourteenth Amendment rights to due process and a jury trial by the state trial court's refusal in his case to instruct the jury on the voluntary act requirement?

IV.

Even if, as the federal court of appeals erroneously concluded, the state statute in question sets forth a defense to, rather than defines the elements of, criminal liability, was not the petitioner nevertheless denied his Sixth and Fourteenth Amendment rights to due process and a jury trial by the state trial court's complete failure to instruct the jury on the central theory of petitioner's defense of not guilty, where that defense was amply supported by the

evidence, that theory of defense was not covered elsewhere in the jury charge, and, indeed, where the jury charge taken as a whole would have misled a reasonable juror to believe that the petitioner's evidence was not relevant at all to his not guilty plea but rather was relevant only to his separate and different plea of insanity?

V.

Where, in a state prosecution for murder, the prosecutor engages in repeated acts of misconduct during the cross-examination of defense experts, called to support petitioner's defense of temporal lobe epilepsy, consisting, inter alia, of asserting many prejudicial facts which the prosecutor knew were not in the record and would not thereafter be made of record, such as the completely unsupported assertion that petitioner had

previously threatened to kill the victim with a kitchen knife, the exact method by which the killing did occur; the irrelevant and unsubstantiated assertion as fact that many people charged with murder are raising the defense of psychomotor seizure; the completely false statement that petitioner had never complained of symptoms associated with psychomotor epilepsy to a physician who had treated him for four years; and the prejudicial assertion that if, in fact, petitioner suffered from temporal lobe seizures, as he claimed, then in the future he could kill any number of additional people, does such misconduct deprive petitioner of a fair and impartial trial guaranteed him under the Sixth and Fourteenth Amendments?

VI.

Where, in a prosecution for murder in a noncapital case, there is evidence offered by the prosecution itself that the killing was the result of a sudden attack upon the victim provoked by sudden rage and where such evidence, if believed by the jury, would be sufficient under state law to reduce the petitioner's crime to voluntary manslaughter, is it a denial of the petitioner's Sixth and Fourteenth Amendment rights to due process and a jury trial for the state trial court, over petitioner's objection, to refuse to instruct the jury on the lesser included offense of voluntary manslaughter?

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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOHN P. McDERMOTT, JR.,

Petitioner,

vs.

ARTHUR TATE, JR., SUPERINTENDENT,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, John P. McDermott, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming the denial of petitioner's petition for writ of habeas corpus by the

United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is set forth in the Appendix at pp. A1 - A27. The Memorandum of Decision and Order of the United States District Court for the Northern District of Ohio is unreported and is set forth in the Appendix at pp. A30 - A35. The unreported Report and Recommendation of the United States Magistrate is set forth in the Appendix at pp. A36 - A53.

The unreported order of the Supreme Court of Ohio dismissing petitioner's appeal as of right and overruling his motion for leave to appeal is set forth in the Appendix at p. A54. The opinion of the Ohio Court of Appeals for the

Eleventh District is unreported and is set forth in the Appendix, pp. A55 - A71.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were filed on December 4, 1986. The petitioner's petition for rehearing and suggestion for rehearing en banc were denied on January 21, 1987. This petition seeks review of the judgment of a United States Court of Appeals entered in a civil case. This Court has jurisdiction to review that judgment by writ of certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the Constitution of the United States. The statutory provisions

involved are Ohio Revised Code Sections 2901.21, 2903.01, 2903.02 and 2903.03. The foregoing constitutional and statutory provisions are set forth in the Appendix, pp. A74 - A82.

STATEMENT OF THE CASE

Procedural History

This petition seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit in a habeas corpus proceeding brought by petitioner to challenge, on federal constitutional grounds, his conviction for murder in the state courts of Ohio.

Petitioner, John P. McDermott, Jr., was convicted of murder, under Ohio Revised Code §2903.02 for the death of Karen Barnes after a jury trial in the court of common pleas for Geauga County, Ohio in November of 1981. He was sentenced to imprisonment for a term of

fifteen years to life. He challenged his conviction without success through the Ohio appellate courts and then having exhausted all available state remedies, he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. That court denied the writ. The United States Court of Appeals for the Sixth Circuit affirmed and petitioner now seeks certiorari review of that judgment.

Facts

Petitioner was indicted by the grand jury for Geauga County, Ohio on a charge of aggravated murder in violation of Ohio Revised Code §2903.01. To that charge, he entered pleas of not guilty and not guilty by reason of insanity. Both of these pleas were based upon the same medical defense - that petitioner had fcr many years suffered from a brain disease

known as psychomotor epilepsy and that the events leading to the death of the victim were the tragic result of a psychomotor seizure. The legal effect of the two pleas was quite different, however, because on the not guilty plea the prosecution had the burden of proof beyond a reasonable doubt of all essential elements of the charged offense, whereas, on the insanity plea, the petitioner had the burden of proof by a preponderance of the evidence of the affirmative defense of insanity. The medical issues were hotly contested at a jury trial in the Common Pleas Court of Geauga County.

A. Prosecutor's Evidence

The State's evidence showed that the victim and petitioner had been well acquainted and had spent much time together. On the day of the killing,

they had dinner together at a restaurant and returned to the victim's home. The episode occurred at about 11:00 p.m. in the small kitchen area of the victim's residence. The victim's son, who was home at the time and who was awakened by a long-ringing telephone call, testified that he heard his mother yelling at petitioner about petitioner having gone through her personal things. He ran to a stairwell landing and witnessed petitioner stabbing her with a kitchen knife. The autopsy revealed that the victim sustained at least thirty stab wounds in the frenzy which resulted in her death. The knife was later found in a river.

That petitioner committed the acts which resulted in the victim's death was not in dispute. The central issues in

this case revolved around the medical defenses which were interposed.[1]

B. The Defense Evidence

The defense presented the testimony of four lay witnesses who had been in a position to observe petitioner's behavior over the years; the testimony of his treating psychiatrist, who several months before the death of the victim had concluded that petitioner might suffer from psychomotor epilepsy; and the testimony of Dr. Howard Tucker, an eminent neurologist.

Dr. Tucker explained in great detail to the jury what epilepsy is, in general, and what psychomotor or, as it is also

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[1] Because there was no evidence whatsoever that the victim's death was the result of any prior calculation and design on the part of the petitioner, the trial court reduced the charge from aggravated murder to murder at the close of the State's case.

known, temporal lobe epilepsy is, in particular. He told the jury about the different forms of epilepsy known to medical science, including psychomotor epilepsy, the form of epilepsy from which petitioner suffered, and of the seizures associated with this brain disease. He distinguished them from the classic convulsions normally associated with the other forms of epilepsy. Unlike grand mal and petit mal epileptic seizures, temporal lobe seizures, which are suffered by persons with psychomotor epilepsy, take a variety of forms. Temporal lobe seizures can take the form of psychogenic feelings or mind alterations - depersonalization. For example, during a seizure, the patient may have the feeling that he is a third party observing his own behavior; the patient may also engage in automatic behavior such as driving a car, or continuing to

perform work such as filing, or continuing to write or even continuing to walk. When the seizure ends, the patient has amnesia for his actions during the course of the seizure.

Dr. Tucker further testified that during a temporal lobe seizure, the patient may engage in violent and aggressive behavior, and that rage reaction, temper outbursts and aggressive behavior with amnesia are cardinal features of psychomotor seizures. He also testified that psychomotor seizures can take the form of trance-like states in which the patient stares into space, oblivious to what is happening around him.

Dr. Tucker testified that upon his review of petitioner's medical history and the results of special tests which were administered to petitioner, together with his own examination of petitioner, it was his opinion that petitioner suf-

fered from temporal lobe epilepsy and that at the time of the killing, he was in the throes of a temporal lobe seizure. He also testified that when petitioner was in the throes of that seizure, he was only semi-conscious, he was unaware of what he was doing, he was unable to control his body movements and his actions were not voluntary but rather were involuntary, the product of a convulsion and seizure.

Additional evidence was offered by the defense at the trial through lay witnesses, whose observations of petitioner's behavior demonstrated that petitioner had for years exhibited the classic symptoms of psychomotor epilepsy which had been described by Dr. Tucker.

Petitioner's psychiatrist, Dr. Walter Mandel, testified that several months before the death of the victim, he concluded, in part from descriptions of

petitioner's conduct and personality changes which the victim herself had earlier described to him, that petitioner might suffer from psychomotor epilepsy, which was consistent with brain damage petitioner sustained as a result of an infection and high fever he contracted while stationed abroad in the military service.

C. Prosecutorial Misconduct

The prosecution's cross-examination of petitioner's medical experts was punctuated by several instances of flagrantly improper conduct, the specific content of which is quoted verbatim from the transcript infra at pp. 45 - 54. Petitioner's objections to the prosecution's improper questioning were nearly all overruled by the trial court and his motions for mistrial were all overruled.

D. The State's Rebuttal

In rebuttal, the State offered the testimony of Dr. Phillip Resnick, a psychiatrist who testified that, in his opinion, petitioner was legally sane at the time of the killing. He stated that, in his opinion, a psychomotor seizure was not the cause of the killing, and that the most likely explanation for petitioner's amnesia for the stabbing was that he suffered an alcoholic blackout. In short, he believed that petitioner killed the victim in a jealous rage and not during a psychomotor seizure.

On cross-examination, however, Dr. Resnick admitted that a person could not be held criminally responsible for his actions during the course of a temporal lobe seizure. He admitted that a person's actions during the course of such a seizure are not voluntary. He stated that he believed it to be a "distinct

possibility" that petitioner suffered from psychomotor epilepsy, but that he had not formed an opinion on that question with reasonable medical certainty.

E. Instructions to the Jury

From the very beginning, the plea of not guilty in this case was entirely based upon the theory that the acts of petitioner were not voluntary within the meaning of Ohio Revised Code §2901.21, which makes the voluntary nature of an individual's acts, as therein defined, a prerequisite to a finding of guilty. But, despite a prior request by petitioner's counsel and over objection, the trial court failed to instruct the jury on that statute. The trial court also, over objection, declined to charge the jury on the lesser included offense of voluntary manslaughter.

Petitioner was found guilty by the jury of murder under Ohio Revised Code §2903.02 and was sentenced by the trial court to imprisonment for fifteen years to life. Petitioner exhausted all of his state appellate remedies without success and, thereafter, sought and was denied habeas relief by the United States District Court for the Northern District of Ohio. That decision was affirmed by the United States Court of Appeals for the Sixth Circuit. Petitioner now seeks certiorari review by this Court of the judgment of the Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

I. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A JURY TRIAL WHEN, AT HIS STATE COURT TRIAL FOR MURDER, THE COURT REFUSED TO INSTRUCT THE JURY ON A STATE STATUTE WHICH ESTABLISHES THE BASIC PREREQUISITES TO THE IMPOSITION OF CRIMINAL LIABILITY.

A.

In Ohio, criminal offenses are codified in Title 29 of the Ohio Revised Code. The first chapter of that Title, Chapter 2901, sets forth general provisions, both procedural and substantive in nature, which are applicable to all offenses in Ohio. One such provision is Ohio Revised Code §2901.21, which is the cornerstone of the entire criminal law of the state of Ohio and defines the fundamental prerequisites to the imposition of any criminal liability in the state. Applicable to every offense in the state

of Ohio, it is appropriately entitled "Requirements for criminal liability" and reads, in pertinent part, as follows:

> Requirements for criminal liability.
>
> (A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:
>
> (1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;
>
> (2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.
>
> * * *
>
> (C) As used in this section:
>
> * * *
>
> (2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.
> (Emphasis added).

In Engle v. Isaac, 456 U.S. 107 (1982), this Court acknowledged the central role this statute plays in Ohio's statutory scheme and observed that it sets forth the basic elements of every offense in Ohio.

> All of the crimes charged against [respondents] require a showing of purposeful or knowing behavior . . . In addition, Ohio punishes only actions that are voluntary, Ohio Rev. Code §2901.21(A)(1) (1975) . . . Self-defense, respondents urge, negates these elements of criminal behavior. . . .

Id. 456 U.S. at 121. (Emphasis added).

It was upon this statutory provision that petitioner based his entire defense of not guilty when he stood trial for his liberty in the court of common pleas of Geauga County, Ohio.

At his trial, petitioner offered substantial evidence, designed to support both his plea of not guilty and his plea of insanity, that the acts on his part

which resulted in the death of the victim were not voluntary but, rather, occurred during a psychomotor epileptic seizure and constituted "convulsions", "body movements during unconsciousness" and "body movements...not otherwise a product of [his] volition." R.C. §2901.21.

Therefore, at the appropriate time, petitioner made two special requests of the trial court for jury instructions regarding this statute: first, that the trial court at least instruct the jury on the statute by bringing the statute to the jury's attention; and second, that the trial court instruct the jury that as one of the elements of the offense charged against petitioner, the prosecution was required to prove beyond a reasonable doubt that the defendant's acts were voluntary within the meaning of

the statute.[2] The trial court, however,

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[2]The transcript of the proceedings reads:

> MR. BERKMAN: The court will probably do it anyway, but I want to make sure that the court instructs the jury on Revised Code Section - I'm sorry. Judge--
>
> THE COURT: Purpose?
>
> MR. BERKMAN: On Revised Code Section 2901.21, which reads as follows: (a) except as provided in division e, this Section, a person is not guilty of an offense unless both of the following apply: 1, his liability is based on conduct which includes either a voluntary act or an omission to perform an act or duty which he is capable of performing. And 2, he has the requisite degree of culpability for each element as to which a culpable mental state is specified by a section defining the defense. I am most concerned about subsection C of that statute which says as used in this Section (C)(2), in fact reflects convulsion, movement during unconsciousness or sleep and body movements that are not otherwise a product of the actor's volition and involuntary acts and I would request an instruction along the lines that the court bring the statute to the jury's attention and instruct the jury that in this case the Prosecution has the burden of proving, beyond a reasonable doubt, that the

(Footnote continued)

over petitioner's objection, refused to honor either of these requests and neglected even to read the statute to the jury.

The inexplicable refusal of the state trial court to instruct the jury on the voluntary act requirement of Ohio Revised Code §2901.21 raises important and fundamental questions under the due process and jury trial clauses of the Sixth and Fourteenth Amendments. The manner in which those questions were

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> acts which caused the death of Karen Barnes were voluntary acts, that they were not reflexes, that they were not convulsions, and that they were not body movements during unconsciousness or sleep and they were not otherwise a product of the actor's volition. I believe that this statute which makes this an element of every crime in the State of Ohio, including the one about which John McDermott is charged, and I would request an instruction which places the burden beyond a reasonable doubt on the Prosecution as to that statutory element.

(Tr. 960-962)(Emphasis added).

resolved adversely to the petitioner by the federal court of appeals below raises equally compelling questions about the proper role of the federal courts, on habeas corpus review, in preserving one of the most fundamental constitutional rights of the accused - the right to have a jury resolve all of the factual issues on which guilt or innocence depends.

This Court in In re Winship, 397 U.S. 358 (1970) expressly held:

> [T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Id., at 364 (Emphasis added).

Moreover, the Sixth and Fourteenth Amendments guarantee that each individual charged with a crime is entitled to a trial by a jury of his peers. Duncan v. Louisiana, 391 U.S. 145 (1968). It necessarily follows from this Court's

decisions that, in securing both these rights, the right to a trial by jury and the right to be free from conviction except upon proof beyond a reasonable doubt of all essential elements of the crime, the jury in a criminal case must be given complete instructions on each element of the crime and on each defense which might negate culpability for the crime. See Mullaney v. Wilbur 421 U.S. 684 (1975); Patterson v. New York, 423 U.S. 197 (1977); Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, _____U.S._____, 105 S.Ct. 1965 (1985); Rose v. Clark, _____U.S._____, 106 S.Ct. 3101 (1986); Marten v. Ohio, _____ U.S._____, 107 S.Ct. 1098 (1987).

The cases previously decided by the Court relevant to this issue have involved challenges to jury instructions creating presumptions or to state laws allocating to the accused the burden of

proving mitigating facts or defenses. The Court has not been presented with the precise issue raised here - whether the complete failure to charge on an essential element of criminality violates the Sixth and Fourteenth Amendments.

This case, therefore, presents the Court with an opportunity to establish a fundamental constitutional rule logically compelled by this Court's prior decisions and important to the administration of the criminal justice system throughout the nation.

For in the present case, the state trial court refused to instruct the jury on a duly enacted state statute which plainly defined one of the essential elements of every offense in the state of Ohio - a voluntary act - in a murder case in which that was the one element of the crime whose existence beyond a reasonable doubt was most vigorously contested by

the accused. As a result, the petitioner was deprived of his constitutional right to a jury trial on the very issue on which his guilt or innocence depended.

B.

This case also presents this Court with an opportunity to provide important guidance on the appropriate analysis to be employed, particularly by federal courts on habeas corpus review of state convictions, in determining when and under what circumstances the refusal to give a jury charge on a contested factual issue in a criminal case deprives the accused of his constitutional rights to a jury trial and to due process of law.

The court below did not take issue with the premise of petitioner's constitutional argument - that the Sixth and Fourteenth Amendments entitled him to a jury charge on each and every element on

which criminal liability depended. Rather, the court below held that a voluntary act, as defined in R.C. 2901.21 is not an element of criminality in Ohio.

The court below reached this conclusion despite the fact that this Court in Engle v. Isaac, supra, had read the very same statute at issue here and had concluded that, indeed, it did set forth a voluntary act as an element of every offense in Ohio, and despite the fact that the Sixth Circuit itself had, in no less than four cases decided prior to the announcement of its decision in the case at bar, recognized that a voluntary act is an essential element of every offense in Ohio, Thomas v. Arn, 704 F.2d 865 (6th Cir. 1983), Howze v. Marshall, 716 F.2d 396, 400 (6th Cir. 1983), Takacs v. Engle, 768 F.2d 122, 126 (6th Cir. 1985), and Wood v. Marshall, 790 F.2d 548, 550 (6th Cir. 1986). Indeed, in Takacs v.

Engle, supra, the Sixth Circuit had expressly stated:

> Ohio requires a "voluntary act" as an element of every crime. See Ohio Rev. Code §2901.21(A)(1). A voluntary act is defined in the negative:
>
> > Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.
>
> Ohio Rev. Code §2901.21(C)(2).

Id. 768 F.2d at 126. (Emphasis added).

In support of its contrary conclusion, the court below relied upon the opinion rendered by the Ohio court of appeals on petitioner's direct appeal to that court. In that opinion the Ohio court of appeals stated that Ohio Rev. Code §2901.21 codifies the fundamental distinction between criminal conduct and innocent behavior. But it then went on to make the seemingly contradictory statement that "'[v]oluntariness' is not

an element of the crime of aggravated murder." The Sixth Circuit's opinion in the present case relies on this latter statement to support its conclusion that a voluntary act is not an element of criminality in Ohio. The court ignored, however, petitioner's argument that that conclusion by the Ohio court of appeals cannot be reconciled with the earlier statement in the same opinion by the Ohio court of appeals that "R.C. 2901.21(A) merely codifies the fundamental distinction between criminal conduct on one hand and innocent conduct or accident on the other." Appendix, p. A59.

It remains a complete mystery how the Ohio court of appeals' declaration that voluntariness, as defined in R.C. §2901.21, is not an element of crime can be harmonized with its concession that R.C. §2901.21 codifies the fundamental distinction between criminal conduct and

innocent behavior under Ohio law. It was, after all, criminal conduct with which petitioner was charged. And the whole point of his trial was to resolve in his case the "fundamental distinction between criminal conduct on one hand and innocent conduct . . . on the other" and to empanel a jury, not a trial judge or a court of appeals, to decide into which of these two categories petitioner's behavior fell.

The Sixth Circuit did not address the evident contradiction contained in the opinion of the Ohio court of appeals. It simply accepted uncritically the judicial pronouncement that voluntariness is not an element of criminality in Ohio. And it failed to address petitioner's argument that despite the refusal of the Ohio court of appeals to attach the label of "element" to voluntariness under R.C. §2901.21, the substance of what the Ohio

court of appeals conceded about that statute - that it codifies the fundamental distinction between criminal conduct and innocent behavior - compels the conclusion that petitioner was denied his Sixth and Fourteenth Amendment rights to due process and to a jury trial by the refusal of the trial court in his case to instruct the jury that the prosecution was required to prove beyond a reasonable doubt that petitioner's actions were voluntary before the jury could find petitioner guilty of criminal conduct.

An important question is, therefore, presented as to whether a criminal defendant is entitled, under the Sixth and Fourteenth Amendments, to have the jury instructed on a state statute which, as interpreted by the state courts, codifies the fundamental distinction between criminal conduct and innocent behavior.

C.

The petitioner alternatively argued in the court below that even if the substance of what the Ohio court of appeals conceded about R.C. §2901.21 is rejected in favor of that court's contradictory conclusion that voluntariness is not an essential element of criminality in Ohio, its ruling should be rejected by the federal courts as constitutionally impermissible because it is inconsistent with the plain language of R.C. §2901.21. The petitioner argued that the Sixth Circuit's own decision in Hoover v. Garfield Heights Municipal Court, 802 F.2d 168, 174 (6th Cir. 1986), made it clear that in ascertaining the elements of a state offense, the state courts are not constitutionally free to alter statutory language or to adopt a construction which is inconsistent with the plain language of a statute. As this Court stated in

McMillan v. Pennsylvania, ____U.S.____, 106 S.Ct. 2411 at 2416 (1986):

> . . . in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive" . . .

(Emphasis added). The court of appeals did not disagree with petitioner's constitutional premise. However, it responded to petitioner's argument as follows:

> Assuming arguendo that petitioner's interpretation of Hoover is correct, we believe that the Ohio Court of Appeals' determination that voluntariness is not an element should nonetheless be followed. There is no "plain language" in section 2901.21 to the effect that voluntariness is an element of, as opposed to a defense to, the crime of murder. Accordingly, we do not believe the Ohio Court of Appeals altered the statutory language in reaching its conclusion.

Opinion of the Sixth Circuit Court of Appeals, (Emphasis added) Appendix, pp. A12 - A13, footnote 2.

The Sixth Circuit's opinion, however, simply cannot be reconciled with the language of R.C. §2901.21. It too plainly and unequivocally enunciates the prerequisites to criminal liability in the first place to be contorted into a statute which merely purports to define what defenses are available to persons charged with crime.

Several factors combine to make it clear that R.C. §2901.21 sets forth the two essential elements which must be present in Ohio before criminal liability may attach for any offense. First, the statute itself is entitled "Requirements for criminal liability" (Emphasis added). That would be a strange way indeed to describe a statute which purports to define defenses to criminal liability. In fact, the statute is entitled "Requirements for criminal liability" because that is precisely what

it defines - those key elements which must be proven before criminal liability may attach at all.

Second, the statute plainly states that ". . . a person is not guilty of an offense unless both of the following apply . . ." Again, a statute setting forth defenses to criminal liability would never be phrased in terms of what must exist before criminal liability will attach in the first instance. Rather, it would state what facts constitute a defense to that which would otherwise render an actor criminally liable. And, indeed, sprinkled throughout the Ohio criminal code are provisions defining certain defenses to criminal offenses and, in each instance, those defenses are expressly denominated as defenses. See e.g. Ohio Rev. Code §2905.05(B), 2905.12(C), 2907.31(C), 2907.32(B), 2913.03(C), 2913.04(B), 2919.21(C) and

(D), 2919.23(C), 2921.21(B), 2921.36(D), 2923.01(I), 2923.02(D), 2923.03(E), 2923.12(C) and 2923.16(E).

Third, the statute plainly goes on to set forth the two basic elements which must coalesce as a precondition to the imposition of any criminal liability in Ohio - a voluntary act and the requisite mens rea. If, as the court below concluded, this statute merely sets forth defenses to, rather than elements of, criminal liability, it would mean that not only is the prosecution never required to prove a voluntary act as an element of any offense in Ohio but neither is the prosecution ever required to prove the requisite mens rea as an element of any offense in Ohio. Rather, under the Sixth Circuit's interpretation of Ohio Rev. Code §2901.21, not only would lack of a voluntary act be in all cases simply a matter of defense but so

would lack of the requisite mens rea. It is inconceivable that mens rea is not an element of any offense in Ohio. Yet the opinion of the court below necessarily leads to that very conclusion.

The plain and unambiguous language of R.C. §2901.21 makes a voluntary act an essential element of every offense in Ohio. Indeed, it was plain to this Court in Engle v. Isaac, supra, and to the court below on four prior occasions that that is what the statute says. By deferring to the irrational contrary conclusion reached by the Ohio court of appeals, the opinion of the federal court below raises a constitutional issue of fundamental importance: to what extent must a state court do violence to plain and unambiguous statutory language setting forth the basic prerequisites to criminal liability before a federal court, interpreting the Sixth and

Fourteenth Amendments, will reject the interpretation made by the state court in favor of the plain statutory language written by the state legislature?

Petitioner submits that, at least in a state such as Ohio, where all crimes are statutory, Ohio Revised Code §2901.03, and where "[t]he elements necessary to constitute a crime must be gathered wholly from the statute", State v. Cimpritz, 158 Ohio St. 490, 490 (1953), the state courts may not deprive the accused of his Sixth and Fourteenth Amendment right to have the jury instructed on all essential elements of criminality prescribed by statute by the simple expedient of a judicial interpretation that is inconsistent with plain statutory language.

D.

Finally, and alternatively, petitioner argued that even if, as the federal court of appeals ultimately and erroneously concluded, Ohio Rev. Code §2901.21 defines defenses to, rather than elements of, criminal liability in Ohio, the petitioner was, nevertheless, deprived of his Sixth and Fourteenth Amendment rights to due process and a jury trial by the state trial court's complete failure to instruct the jury on a central theory of defense amply supported by the evidence.

While conceding that it might be constitutional error for a state trial court to refuse to instruct the jury on a viable defense supported by the evidence, the federal court of appeals below determined that the gist of petitioner's valid defense of involuntary conduct was adequately communicated to the jury by

the trial court's instruction on intent or purpose.

However, intent or purpose is an element of criminality in Ohio wholly apart from and in addition to the voluntary act requirement and Ohio Revised Code §2901.21 expressly differentiates between those two requirements. Moreover, in its charge to the jury on this element of the offense, the trial court never advised the jury that an act committed by petitioner as a result of "convulsions", or "body movements during unconsciousness" or "body movements...not otherwise a product of [petitioner's] volition" was sufficient as a matter of law, if so found by the jury, to raise a reasonable doubt as to petitioner's guilt.

Perhaps more importantly, the trial court instructed the jury as follows in

connection with its charge on intent or purpose:

> The purpose with which a person does an act is determined from the manner in which it was done, the weapon used and all other facts and circumstances in evidence.
>
> If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill may be inferred from the use of the weapon.
>
> A deadly weapon is any instrument, device, or thing capable of inflicting death, possessed, carried or used as a weapon.

Based on this instruction, it was enough for the jury to accept the undisputed fact that petitioner caused the victim's death with a knife in order for the jury to conclude that the prosecution had proven the element of purpose beyond a reasonable doubt, regardless of any consideration of whether the underlying act was voluntary.

Indeed, there is nothing in the entire charge to the jury given in this case that would even alert the jury to the fact that the defense evidence concerning psychomotor epilepsy was legally pertinent to the plea of not guilty. The natural effect of the charge, read in its entirety, was to leave the jury with the misimpression that the defense of psychomotor seizure was legally relevant only to the plea of insanity, as to which petitioner had the burden of proof by a preponderance of the evidence, and not to the plea of not guilty, as to which the prosecution bore the burden of proof beyond a reasonable doubt. Indeed, the federal district court's opinion seems to arise from and fosters this same misimpression as it notes ". . . [t]he question of a defendant's criminal volition is raised by the defense of

insanity, and addressed in the charge on that issue." (Appendix, p. A34).

That the defense of psychomotor seizure was legally relevant to the plea of not guilty is made clear by R.C. §2901.21, the specific language of which fits the factual issues raised by this case like a glove. And the jury would have understood this had it been instructed on the specific language of R.C. §2901.21.

The instructions as given completely failed to bring to the jury's attention one of the most critical determinants of petitioner's culpability. Failure to submit the highly relevant statute for the jury's consideration completely washed away petitioner's defense and thus denied him his rights to due process and trial by jury.

II. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY REPEATED ACTS OF MISCONDUCT OF THE PROSECUTOR WHO INJECTED INADMISSIBLE AND UNESTABLISHED EVIDENCE INTO THE RECORD, AND WHO COMMUNICATED HIS PERSONAL BELIEF TO THE JURY THAT PETITIONER WAS GUILTY.

Petitioner argued in the courts below that he was denied his Sixth and Fourteenth Amendment right to a fair trial by repeated acts of misconduct on the part of the prosecutor during the course of his cross-examination of petitioner's expert witnesses, who had been called to support his defense of psychomotor seizure. Although the federal court of appeals below conceded that "the complained of remarks [of the prosecutor] may have been deliberately placed before the jury," Opinion of the Sixth Circuit Court of Appeals, p. A27, it concluded that because the remarks

were "not extensive, and the proof of guilt was overwhelming," Id., the petitioner had not been denied a fair trial.

The record, however, belies the de minimus characterization by the court below of the prosecutor's misconduct when measured quantitatively and qualitatively. First, the record will show that the prosecutor's conduct was pervasive, rather than not extensive, and second, proof of guilt was hotly contested, rather than overwhelmingly shown. Petitioner's medical defenses were well supported by substantial evidence and even the prosecutor's expert witness conceded the vailidity of a defense of psychomotor epilepsy. And it was in the cross-examination of the petitioner's expert witnesses that the prosecutor abused his office to confuse, mislead and instill passion and prejudice against petitioner, by injecting irrelevant and

inadmissible facts into the proceeding and by expressing his personal belief of petitioner's guilt.

Given the complexity of the medical defenses interposed by petitioner, the greater was the trial court's obligation in furtherance of due process to ensure that petitioner be permitted to present those defenses to the jury unencumbered by irrelevant facts which undermined them and prejudiced the jury against him.

Egregious misconduct occurred during the cross-examination of the defense experts. During the course of the cross-examination of Dr. Tucker and Dr. Mandel, the prosecutor repeatedly injected facts into the record which were never supported by any evidence that was ever offered or admitted. By his screaming tone, the prosecuting attorney also conveyed to the jury his <u>personal</u> belief that the defense of psychomotor epilepsy

interposed by petitioner was a sham. Some of the more flagrantly improper questions are detailed here.

During the cross-examination of Dr. Tucker, the following exchange occurred.

> Q. You said you have to know your patients. Every single thing that John McDermott put down and every report that you have looked at, including your own conversation with Mr. McDermott, was self-serving, wasn't it? It was a self-serving declaration by him.
>
> A. Not in the sense that he didn't know what I was looking for.
>
> Q. Oh, he knew what you were looking for, didn't he, Doctor? There are a lot of people charged with murder that bring up the defense of psychomotor seizure, don't they?
>
> MR. BERKMAN: Objection
>
> THE COURT: Overruled
>
> A. I don't know about that.
>
> Q. It is a fact it's becoming more prevalent?
>
> A. I don't know about -

Q. Let me ask a question. It's a fact it's becoming more prevalent that more and more people charged with serious crimes are bringing up the defense of psychomotor seizure.

MR. BERKMAN: Objection

THE COURT: It's overruled.

A. I would say I have never been invited to testify on psychomotor seizures before, nor do I know of my colleagues that have been so invited.

* * *

MR. BERKMAN: It is apparent by the line of questions that Mr. Albert is using on this cross examination of this Doctor that he is attempting to testify himself about what he believes to be the prevalence of the use of a defense for some phony purpose. Already I think he's done so much damage that at this time I am going to move for a mistrial.

THE COURT: Overruled.

(Tr. 729-731; Emphasis added).

Obviously, evidence concerning the statistical frequency with which defendants, in general, raise certain types of defenses was altogether irrelevant to any factual issue raised by this case involving a specific criminal charge against a particular individual arising out of a specific set of facts. Apart from that basic proposition, however, no evidence was ever offered or introduced at trial to support the factual statements made by the prosecutor. Thus, in making these inflammatory statements in the presence of the jury, the prosecutor was not engaged in legitimate cross-examination of Dr. Tucker concerning the testimony he gave on direct examination; but rather, was improperly poisoning the minds of the jurors by injecting inadmis-

sible evidence into the record for which there was no factual basis.

Also during the cross-examination of Dr. Tucker, the following occurred:

Q. Do you know that Dr. Garcia treated McDermott from 1974 to 1978?

A. I didn't know that.

Q. If I told you that Dr. Garcia will testify that at no time from 1974 through 1978 -

MR. BERKMAN: Objection.

MR. ALBERT: Well, I am going to make a hypothetical question, Your Honor.

THE COURT: Yes, go ahead.

Q. If I tell you that Dr. Garcia treated John McDermott from 1974 to 1978 and John McDermott never told him about one trance, would your opinion be the same, that he had a psychomotor seizure?

(Tr. 728-729)(Emphasis added).

Shortly thereafter, the following exchange occurred.

Q. I am not saying it's a prostitution of one's

talents, Doctor, I am saying this man is charged with murder and you are saying November 4th, 1980, 11:30, he had a psychomotor seizure. That's what I'm saying.

A. I am glad you are agreeing with me then, that's what I did say and I said for ten years he had psychomotor seizures.

Q. Yet, he never ever mentioned it to Dr. Garcia who treated him for four years.

MR. BERKMAN: Objection, that isn't the evidence.

THE COURT: It's overruled.

(Emphasis added).

The prosecutor's statements about Dr. Garcia were completely false. As Dr. Garcia later testified, he had treated the petitioner for his diabetic condition for a period of two years, not four, and during that period the petitioner had complained of trances.

At another point in the cross-examination of Dr. Tucker, the following exchange occurred.

Q. Again, Doctor, that's him saying that Karen pulled the knife, correct? Nobody else is saying that other than John McDermott, correct?

A. I take that on history.

Q. But, we would call it another self-serving declaration, correct?

A. I have no comment on that.

Q. Well, it's something to benefit him, wouldn't that be fair to say? It's something that's benefitting him.

A. Or it's the truth.

Q. No, could be the truth, possibly defense, correct?

A. Surely.

Q. Not only am I going to argue psychomotor epilepsy, I will argue self-defense. I will show everything in there.

A. I am not a lawyer.

MR. BERKMAN: Objection. There has been no imposition of that defense as Mr. Albert well knows.

THE COURT: Sustained.

MR. ALBERT: No, there isn't, hasn't been any

defense posed, but it is still self-serving.

THE COURT: Ask your next question.

(Tr. 757-758)(Emphasis added).

Here again, the prosecutor was doing nothing more than making factual assertions highly prejudicial to the petitioner under the guise of cross-examining Dr. Tucker.

At yet another point in the cross-examination of Dr. Tucker, the following occurred:

> Q. Doctor, you stated I believe that the way that you would treat a condition like this one that Mr. McDermott has is by the use of drugs, is that correct?
>
> A. That's right, that's where I'd certainly start.
>
> * * *
>
> Q. So, if the patient doesn't come in, you don't know whether he's taking the drug?
>
> A. True.

Q. If he doesn't take the drug, then he could go out and commit a murder again, correct?

A. He could have ongoing temporal lobe seizures.

Q. If he goes on and has ongoing temporal lobe seizures, he not only can kill Karen Barnes, he can kill anyone of a number of people?

MR. BERKMAN: Objection.

THE COURT: Sustained.

MR. BERKMAN: May we approach the bench?

THE COURT: Do you have a motion?

MR. BERKMAN: Yes.

THE COURT: It's overruled. Make it anyway.

(Thereupon the following proceedings were had at the bench outside the hearing of the jury).

MR. BERKMAN: I believe that the badgering that the Prosecutor has done with this witness has caused a climate in the courtroom which requires that a motion for mistrial be made.

THE COURT: Overruled. I have already ruled on it.

(Tr. 767-768)(Emphasis added).

The prejudicial effect of these improper comments by the prosecutor is obvious. Just as obvious is the suggestion implicit in these remarks that the jury should convict petitioner not on the basis of the evidence adduced but because the disease he has makes him dangerous. Indeed, the remarks were especially insidious because the real message communicated by them was that petitioner's conviction was even more important if the jury accepted, rather than rejected, his legitimate defense of psychomotor epilepsy, because, according to the prosecutor, that made it more likely that petitioner would engage in violent behavior in the future.

On cross-examination of Dr. Mandel, the prosecutor asked:

Q. He [petitioner] told you that he was strangling her and threatened to kill her with a kitchen knife?

MR. MURRAY: Objection, Your Honor.

THE COURT: It's overruled. He may answer.

* * *

A. I do not recall being told of this.

This statement made by the prosecutor that months before the tragedy of November 4, 1980, petitioner had threatened to kill the victim with a kitchen knife was terribly inflammatory and prejudicial. And there was never any evidence offered or admitted at trial to supply any factual basis for the assertion contained in the prosecutor's question.

These episodes of misconduct by the prosecutor, both individually and cumulatively, deprived petitioner of a

fair trial in violation of the Sixth and Fourteenth Amendments.

In contrast to the misconduct complained of in United States v. Young, 470 U.S. 1 (1985), in which no objection was made at trial to the prosecutor's remarks, the misconduct here was objected to repeatedly by petitioner's counsel. The objections were overruled by the trial court in the presence of the jury, and thus the jury was presented with the view that the prosecutor's misstatements were correct and that his improper tactics received the imprimatur of the trial court. The misconduct here presented was also more serious and damaging than that examined by the Court recently in Darden v. Wainwright, ____ U.S.____, 106 S.Ct. 2464 (1986), because the misconduct here occurred during the fact-finding proceeding in which the jury was called upon to determine petitioner's

guilt or innocence. The conclusion is inescapable that the jury was affected by the prosecutor's misconduct, and that petitioner was therefore denied a fair trial guaranteed him by the Sixth and Fourteenth Amendments.

III. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER WAS DENIED HIS RIGHTS, UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, TO DUE PROCESS AND A JURY TRIAL BY THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER.

This case presents an important question not heretofore decided, that is, whether the rule of Beck v. Alabama, 447 U.S. 625 (1980), in which the Court held that the Due Process Clause of the Fourteenth Amendment requires that in a capital case a jury must be permitted to consider a verdict of guilt of a lesser included noncapital offense, should be extended to require the giving of an

instruction on a lesser included offense in a state prosecution of a noncapital offense where there is some evidence upon which the jury could determine that the lesser offense was committed. This question was expressly reserved and not decided in Beck v. Alabama, supra, 447 U.S. at 638, footnote 14. It has been suggested, however, that the rule of Beck v. Alabama should be extended to non-capital cases.

> The Court's decisions in both Keeble and Beck imply that affording jurors a less drastic alternative may be constitutionally necessary to enhance or preserve their essential factfinding function.

Holloway v. Florida, 449 U.S. 905, 908, (1980), Blackman, J., dissenting from the denial of petition for a writ of certiorari.

In Keeble v. United States, 412 U.S. 205 (1973), Justice Brennan, writing for the majority, acknowledged that the Court

has "never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have a jury instruction on a lesser included offense", Id. 412 U.S. at 213, but cautioned that a construction of a statute so as to preclude the giving of an instruction on a lesser included offense "would raise difficult constitutional questions." Those same constitutional questions are presented here in the context of the Sixth and Fourteenth Amendments, where it is established that under state law the evidence warranted the giving of the instruction on the lesser offense.

The petitioner requested that the trial court instruct the jury on the lesser included offense of voluntary manslaughter, pursuant to Ohio Revised Code §2903.03(A) which provides that no person shall knowingly cause the death of

another "while under the influence of sudden passion or in a sudden fit of rage...." The trial court, however, refused the request.

The Sixth Circuit Court of Appeals recognized, on the authority of Brewer v. Overberg, 624 F.2d 51, 52 (6th Cir. 1980), cert. denied 449 U.S. 1085 (1981), that the failure to give a lesser included offense instruction in a case in which there is some evidentiary support in the record for the instruction is constitutional error. Court of Appeals Opinion, Appendix, pp. A22 - A23. The court concluded, however, that there was insufficient evidence in the record in the case at bar to support an instruction on voluntary manslaughter under Ohio Revised Code §2903(A). The court's conclusion, however, was based upon a misunderstanding of what evidence is sufficient under Ohio law to permit a

jury to find an accused guilty of voluntary manslaughter.

The record shows that the victim's son, who testified on behalf of the prosecution, stated that he was awakened at 11:00 p.m. by the telephone. He testified that he heard petitioner and the victim arguing and fighting. The argument taking place on the first floor of the victim's condominium was loud enough and heated enough for the son to hear it from his bedroom on the second floor. The victim was yelling at the petitioner about his having gone through her personal things. She continued to yell and it was at this point that the killing occurred.

Further testimony offered by the prosecution showed that the victim suffered over 30 stab wounds, several of which were superimposed one over another. This evidence, in combination with the

son's testimony concerning the heated argument in which petitioner and the victim were engaged, strongly suggests that the killing occurred during a frenzy of rage and emotional stress. Moreover, the weapon used in the killing was a kitchen knife taken from a knife rack in the kitchen no more than 3 feet from where the victim was positioned at the time of the tragedy, a fact also suggestive of a sudden attack.

In its opinion, the federal court of appeals below summarized this evidence and then expressly concluded that:

> The evidence petitioner now relies on may be suggestive of a sudden attack provoked by sudden rage.

Court of Appeals Opinion, Appendix, p. A25.[3/] But the court then held that

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[3/] The Court of Appeals incorrectly states that petitioner did not rely on this same evidence before the Ohio court of appeals. In fact, in one of the (Footnote continued)

such evidence is insufficient under Ohio law to support an instruction on voluntary manslaughter. In fact, however, contrary to the court's holding, such evidence is sufficient under Ohio law to reduce murder to voluntary manslaughter. In State v. Muscatello, 55 Ohio St.2d 201 (1978), the leading case in Ohio on the subject, the Ohio Supreme Court held, in paragraph 5 of its syllabus:

> An act committed while under the extreme emotional stress described in R.C. 2903.03(A) is one performed under the influ-

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arguments made in his brief-in-chief filed in the Ohio court of appeals, petitioner expressly and strenuously argued that he was entitled to a lesser included offense instruction based upon the very same evidence upon which he later relied in the federal courts. Indeed, in his reply brief filed in the Ohio court of appeals, he re-emphasized the same evidence. After the Ohio court of appeals rendered its opinion in which it completely ignored this evidence, petitioner filed a motion for reconsideration in which he specifically complained about the fact that the Ohio court of appeals wholly failed to consider this argument.

> ence of sudden passion or in the heat of blood, without time and opportunity for reflection or for passions to cool.

(Emphasis added).

This standard is fully satisfied by the Court of Appeals' conclusion that the evidence in this case "...may be suggestive of a sudden attack provoked by sudden rage." See also State v. Wilkens, 64 Ohio St.2d 382 at 388 (1980), in which the Ohio Supreme Court held:

> The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to defendant. (Emphasis added).

Since under Ohio law the evidence was sufficient to support a lesser included offense instruction, it was con-

stitutional error for the trial court to refuse to give it.

The Court should accept this case to consider whether petitioner suffered a constitutional deprivation by the failure to charge on the lesser included offense of voluntary manslaughter.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Court to grant the writ of certiorari and accept this case for review.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3181

JOHN P. McDERMOTT, JR.,
Petitioner-Appellant,

v.

E. P. PERINI,
Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio

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Filed December 4, 1986

Before: KENNEDY and MILBURN, Circuit Judges; and BROWN, Senior Circuit Judge

PER CURIAM. Petitioner John McDermott, Jr., presently serving a sentence of fifteen years to life for his conviction of murder by an Ohio jury, appeals the judgment of the district court denying his petition for a writ of habeas corpus under 28 U.S.C. §2254. The issues raised are (1) whether petitioner

was denied his rights under the Sixth and Fourteenth Amendments because the trial court refused to instruct the jury on an Ohio statute that petitioner asserts defines an essential element (voluntariness) of the offense charged; (2) whether petitioner was denied due process and a trial by jury because by refusing to give an instruction on voluntariness the trial court denied petitioner the opportunity to have his defense presented to the jury; (3) whether petitioner was denied due process because the trial court refused to instruct the jury on the lesser included offense of voluntary manslaughter; and (4) whether petitioner was denied a fair trial due to prosecutorial misconduct. For the reasons discussed below, we affirm.

I.

On November 12, 1980, an Ohio grand jury indicted petitioner for aggravated murder in violation of Ohio Rev. Code Ann. §2903.01.[1] Petitioner entered pleas of not guilty and not guilty by reason of insanity. Trial was held from March 26, 1981, to March 31, 1981.

The evidence showed that petitioner regularly visited the victim, Karen Barnes, at her apartment. On the afternoon of November 4, 1980, when petitioner arrived at the apartment, Ms. Barnes was not yet home from work, although her two children, Greg, age eleven, and Steven, age eight, were already home from school. Ms. Barnes arrived around 5:00 p.m.

At 11:00 p.m., Greg was awakened in his upstairs bedroom by the telephone,

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[1]The trial court reduced the charge to murder in violation of Ohio Rev. Code Ann. §2903.02 at the close of all proof.

which rang six times; no one answered it. Greg heard petitioner and Ms. Barnes arguing downstairs. Ms Barnes was yelling about petitioner's going through her personal things. Greg then heard his mother call for him. Greg went to the landing and observed petitioner stabbing Ms. Barnes. Petitioner ran upstairs and ordered Greg to get in bed. Petitioner then went into the bathroom and washed his hands. He then went back downstairs, but returned upstairs shortly to Ms. Barnes' bedroom, where he disconnected the telephone. Petitioner went downstairs again, turned the television on with the volume on high, and exited the apartment. After about fifteen minutes, Greg and Steven went downstairs and found their mother dead in the kitchen. Greg then went to a neighbor's house, and the police were notified.

When the police arrived, they discovered on the wall next to the victim's body a knife rack with two knives, although there were spaces for three. The murder weapon was not in the apartment. The third knife, which was the murder weapon, was later found in a nearby river. An autopsy revealed at least thirty stab wounds.

Petitioner's pleas of not guilty and not guilty by reason of insanity were based upon the same medical defense, viz., that the murder was the result of petitioner's suffering a psychomotor seizure as a result of a brain disease known as psychomotor epilepsy. Petitioner presented a great deal of medical evidence in support of his theory. It is sufficient to note for the present purposes that evidence was adduced that petitioner had suffered from psychomotor epilepsy for a period of years prior to the mur-

der, that he was suffering from a seizure at the time of the murder, and that, consequently, petitioner was unable to make a distinction between right and wrong or to control his behavior; i.e., petitioner's actions were involuntary.

The jury rejected petitioner's insanity defense and returned a verdict of guilty. On direct appeal, petitioner raised numerous issues, including those asserted in his habeas petition. The Ohio Court of Appeals affirmed the conviction and sentence. Of particular importance to the present appeal is the court's holding that, "'Voluntariness' is not an element of the crime of aggravated murder." Joint Appendix at 24. The Ohio Supreme Court summarily denied petitioner's request for leave to appeal, prompting petitioner to file the present action.

II.

Petitioner's first and second arguments surround the trial court's refusal to instruct the jury on Ohio Rev. Code Ann. §2901.21, which provides in pertinent part:

> Requirements for criminal liability.
>
> (A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply.
>
> (1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;
>
> (2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.
>
> * * *
>
> (C) As used in this section:
>
> * * *
>
> (2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise

> a product of the actor's volition, are involuntary acts.

Id.

A.

Petitioner first argues that, under Ohio law, voluntariness is an element of the crime of murder and that, accordingly, it was constitutional error for the trial court to fail to instruct the jury that the prosecution has the burden of proving, beyond a reasonable doubt, that the acts which caused the killing were voluntary. The failure to instruct on an essential element of a crime is constitutional error of a magnitude such that it can never be harmless. Hoover v. Garfield Heights Municipal Court, 802 F.2d 168, 177 (6th Cir. 1986). See Glenn v. Dallman, 686 F.2d 418, 421 (6th Cir. 1982). Thus, the critical inquiry as to the present issue is whether voluntari-

ness is an element of the crime of murder in Ohio.

To our knowledge, the Ohio Supreme Court has not addressed this issue. Petitioner had directed our attention to numerous Sixth Circuit habeas cases containing language indicating that, under Ohio law, voluntariness is an element of the crime. See Takacs v. Engle, 768 F.2d 122, 126 (6th Cir. 1985) ("Ohio requires a 'voluntary act' as an element of every crime."); see also Wood v. Marshall, 790 F.2d 548, 550 (6th Cir. 1986); Howze v. Marshall, 716 F.2d 396,400 (6th Cir. 1983), cert. denied, 465 U.S. 1013 (1984); Thomas v. Arn, 704 F.2d 865, 876 (6th Cir. 1983). But see White v. Arn, 788 F.2d 338, 345 (6th Cir. 1986) (stating that a voluntary act is not an element of the crime of murder in Ohio). However, the State is correct that the language relied on by petitioner in the

Sixth Circuit cases is dicta. In each case, the issue presented was whether it was constitutional error for the state to place the burden of proving a particular defense on the accused. The petitioners argued that the defenses at issue negated an element of the offense charged, including voluntariness. It was necessary that we at least assume that voluntariness was an element; otherwise, the petitioner's arguments would have had no constitutional significance. See, e.g., White v. Arn, 788 F.2d at 343-44 ("The proper approach . . . is first to determine the elements of murder, and second to determine whether the defense . . . . necessarily negates any of those elements."). However, in each case we determined that the defense at issue did not negate the voluntary act requirement set forth in Ohio Rev. Code Ann. §2901.21(A). Given these holdings, any

"finding" that voluntariness is an element was not "essential to determination of the case." Black's Law Dictionary 409 (5th ed. 1979) (defining "Dictum"). We therefore do not feel bound by the cases relied on by petitioner as a matter of stare decisis.

Normally, we would be inclined to consider whether we nonetheless should follow our prior language in Takacs, dicta or not. However, we feel bound to follow the contrary pronouncement of the Ohio Court of Appeals in the direct appeal of petitioner's conviction. See Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law"). Cf. Long v. Smith, 663 F.2d 18, 22-23 (6th Cir. 1981) ("In a habeas corpus proceeding, it is not the province of a federal appellate court to review the decision of the state's highest court on purely state

law. Federalism requires that we accept the state Supreme Court's decision on state law as being correct as state courts must respect the decisions of federal courts on federal law."), cert. denied, 455 U.S. 1024 (1982). Accordingly, because the Ohio court has determined that voluntariness is not an element of the crime of murder in Ohio, there was no constitutional error in the trial court's refusal to instruct that the prosecution bore the burden of proving a voluntary act.[2]

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[2]Subsequent to oral argument, petitioner filed a letter pursuant to Fed. R. App. P. 28(j) directing our attention to Hoover v. Garfield Heights Municipal Court, 802 F.2d 168 (6th Cir. 1986). Petitioner asserts that in Hoover we "[made] it clear that in ascertaining the elements of a state offense, the state courts are not free to alter statutory language or to adopt a construction which is inconsistent with the plain language of a statute." Assuming arguendo that petitioner's interpretation of Hoover is correct, we believe that the Ohio Court of Appeals' determination that volun-
(Footnote continued)

B.

Petitioner's second argument is that even if the voluntariness requirement set forth in section 2901.21 is not an element of the crime of murder, it is surely a defense. Petitioner argues that the failure to instruct the jury on his theory of the case was a violation of due process. Petitioner relies on United States v. Garner, 529 F.2d 962 (6th Cir.), cert. denied, 429 U.S. 850 (1976), wherein we held on direct appeal that "when a theory of defense finds some sup-

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tariness is not an element should nonetheless be followed. There is no "plain language" in section 2901.21 to the effect that voluntarienss is an element of, as opposed to a defense to, the crime of murder. Accordingly, we do not believe the Ohio Court of Appeals altered the statutory language in reaching its conclusion. Moreover, as noted supra, a panel of this court has also concluded that voluntariness is not an element of the crime of murder. See White v. Arn, 788 F.2d at 345.

port in the evidence and in the law, a defendant is entitled to some mention of that theory in the instructions." Id. at 970. In the instant case, petitioner's theory of defense "finds some support in the evidence and in the law."

However, in a habeas proceeding the petitioner must satisfy a much higher standard:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." . . . not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'". . . .
>
> . . . An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of law.

Henderson v. Kibbe, 431 U.S. 145, 154-55 (1977) (citations and footnote omitted); see also Martin v. Foltz, 773 F.2d 711, 718 (6th Cir. 1985), cert. denied, 106 S.Ct. 3336 (1986). "[I]f the state court finds the instructions correct (as it did here), then only where the instructions infect the fairness of the entire trial will due process be violated." Owens v. Foltz, 797 F.2d 294, 296 (6th Cir. 1986).

In the present case, the question thus becomes whether the failure to instruct on section 2901.21 so infected the entire trial that the conviction violates due process. In Henderson, the Supreme Court found no constitutional error in the trial court's failure to instruct on causation in part because the instruction on recklessness encompassed the gist of causation. The Court reasoned that "since it is logical to assume that the jurors would have responded to

an instruction on causation consistently with their determination of the issues that were comprehensively explained, it is equally logical to conclude that such an instruction would not have affected their verdict." 431 U.S. at 156 (footnote omitted).

A similar result is required in the present case. The trial judge instructed the jury, in part, that:

> Before you can find the defendant guilty of the charge, you must find beyond a reasonable doubt:
>
> 1) That Karen Barnes was a living person and that her death was caused by the defendant in Geauga County, Ohio, or [sic] or about the 4th day of November, 1980;
>
> 2) That the killing was done purposely;
>
> You will note that purpose to kill is an essential element of the crime of murder.
>
> A person acts purposely when it is his specific intention to cause a certain result, that is the death of another. It must

be established that at the time in question there was present in the mind of the defendant a specific intention to cause the death of Karen Barnes.

Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent means [sic] the same thing. The purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.

The purose [sic] with which a person does an act is determined from the manner in which it was done, the weapon used and all the other facts and circumstances in evidence.

If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill may be inferred from the use of the weapon.

Joint Appendix at 246-47.

In our view, it would simply not have been possible for the jury to conclude that petitioner acted purposefully and at the same time to conclude that the

killing was not the result of a voluntary act. Petitioner strenuously argues that purposefulness and voluntariness are not the same and notes that Ohio Rev. Code Ann. §2901.21(A) draws a distinction between the voluntariness requirement and the mens rea requirement. However, even if we assume that "[i]n a strict sense, an additional instruction on [voluntariness] would not have been cumulative," Henderson v. Kibbe, 431 U.S. at 156, the writ must nonetheless be denied.

As stated, in Henderson v. Kibbe, the Court found no constitutional error in the failure of the trial court to instruct on an issue where it was "logical to assume that the jurors would have responded to [the requested instruction] consistently with their determination of the issues that were comprehensively explained." Id. at 156. In such a situation "it is equally logical to conclude

that such an instruction would not have affected their verdict." Id. (footnote omitted).

In the present case it is logical to conclude that the jury would have responded to an instruction on voluntariness consistently with their determination of the purposefulness element, which was comprehensively explained. As set forth supra, the trial judge instructed the jury that "purpose is a decision of the mind to do an act with a conscious objective of producing a specific result." If, as is petitioner's theory, the murderous acts were caused by uncontrolled electrical discharges in petitioner's brain, there logically would have been no decision formed in petitioner's mind to do the act. However, the jury necessarily concluded that petitioner did in fact form a decision in his mind to do the act. Accordingly, it is

logical to assume that had the jury been instructed on voluntariness, they would have rejected the defense consistent with their finding that petitioner acted purposefully in killing the victim.[3]

Put another way, the mind cannot carry out its decisions to act alone; it must translate that decision into physical activity by engaging the voluntary muscles of the body. Thus, the jury having concluded that petitioner acted purposefully, it is logical to conclude that the jury would have further concluded that his actions were the result of the decision petitioner formed in his

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[3]It might be the case that an individual could form the mental intention to do an act and yet be unable, for physical reasons, to translate that intent into a physical act. In the present case, however, the physical act did in fact occur. It is implicit in the jury's determination of guilt that the jury concluded that the physical act was the result of the formation in petitioner's mind of the intent to kill.

mind to stab the victim, i.e., that his actions were voluntary and not the result of uncontrolled electrical discharges in the brain.

Petitioner argues that the jury did not necessarily make a finding that encompassed the defense theory because the trial court instructed that the jury could infer purposefulness from the undisputed fact that a knife was used. Petitioner further notes that it tailored its evidence to the voluntariness requirement and that his witnesses used the term voluntariness, rather than purposefulness.

If this were a direct appeal we might find these arguments more persuasive. However, in this collateral proceeding, we must assure ourselves only that petitioner received a fundamentally fair trial. Under the circumstances of this case, "we reject the suggestion that

the omission of [an instruction on the voluntariness] issue 'so infected the entire trial that the resulting conviction violated due process.'" Henderson v. Kibbe, 431 U.S. at 156-57.

C.

Petitioner next argues that he was denied due process because the trial court failed to instruct on the lesser included offense of voluntary manslaughter. Petitioner correctly notes that this court has held that "the failure of a state court to instruct the jury on lesser included offenses raises a question that is cognizable on habeas corpus review." Brewer v. Overberg, 624 F.2d 51, 52 (6th Cir. 1980) (per curiam), cert. denied, 449 U.S. 1085 (1981). The Brewer court further noted that "[t]he Ohio courts have repeatedly held that it is prejudicial and reversible error for

the trial court to refuse an instruction on lesser included offenses if the evidence could reasonably support a verdict on such offenses." Id. at 53 (emphasis supplied).

The issue then is whether the evidence in the present case reasonably could have supported a verdict on the offense of voluntary manslaughter. Ohio Rev. Code Ann. §2903.03(A) provides:

> No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another.

Before the Ohio Court of Appeals, petitioner supported his claim by relying on the testimony of Dr. Tucker that petitioner told Dr. Tucker that he and the victim argued, that he was sure Ms. Barnes was less than honest in their

relationship when she declined to answer the telephone, that Ms. Barnes got a knife and he grabbed it from her, that Ms. Barnes went for another knife, and it was then that he killed her. The Ohio Court of Appeals and the district court held that this evidence could not support a request for a voluntary manslaughter instruction because, under Ohio Rev. Code Ann. §2945.40(D), statements made by a defendant in an examination relating to his mental condition at the time of the commission of the crime are inadmissible against the defendant on the issue of guilt. Petitioner apparently accepts this holding because he does not presently rely on this evidence.

Instead, petitioner cites Greg Barnes' testimony that he heard petitioner and Ms. Barnes arguing, testimony showing that the victim suffered over 30 stab wounds, and testimony that the mur-

der weapon was taken from a knife rack no more than three feet from where the victim was positioned. Petitioner asserts this evidence is consistent with and suggestive of a sudden attack provoked by sudden rage.

The evidence petitioner now relies on may be suggestive of a sudden attack provoked by sudden rage. However, the mere fact that petitioner and the victim were arguing loudly does not establish the requirement that the rage be brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force. Accordingly, petitioner's claim is without merit. See O'Guin v. Foltz, 715 F.2d 397, 399 (6th Cir. 1983) (unless there is evidentiary support for the lesser included offense instruction, there can be no violation of due process from the refusal to give it).

Petitioner's final argument is that the prosecutor engaged in misconduct such that he was denied a fair trial. In support of his claim, petitioner relies on direct appeal cases such as United States v. Leon, 534 F.2d 667 (6th Cir. 1976). However, in Leon, the defendant's conviction was reversed "in the exercise of [the court's] supervisory powers." Id. at 682. In a habeas proceeding, the review is "'the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court.'" Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974) (quoting DeChristoforo v. Donnelly, 473 F.2d 1236, 1240 (1st Cir. 1973)). This court has stated that "[b]efore habeas relief is granted, the prosecutor's statements must be so egregious as to render the trial fundamentally unfair." Angel v. Overberg, 682

F.2d 605, 608 (6th Cir. 1982) (en banc) (citation omitted).

We have reviewed the actions of the prosecutor to which petitioner objects. Although the complained of remarks may have been deliberately placed before the jury, the remarks were not extensive, and the proof of guilt was overwhelming. On balance, we do not believe the remarks to be "so egregious as to render the trial fundamentally unfair." Id.

III.

Accordingly, the decision of the district court denying petitioner's request for habeas relief is AFFIRMED.

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By /s/ George McCarthy
Deputy Clerk

ISSUED AS MANDATE: February 18, 1987
COSTS: None

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3181

JOHN P. McDERMOTT, JR.,
Petitioner-Appellant,

v.

E. P. PERINI,
Respondent-Appellee

Order

Filed January 21, 1987

Before: KENNEDY and MILBURN, Circuit Judges and BROWN, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman/LS
John P. Hehman, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN P. McDERMOTT, JR.	)	CASE NO. C83-85
	)	
	)	JUDGE ALICE M.
Petitioner	)	BATCHELDER
	)	
v.	)	
	)	
E.P. PERINI	)	
	)	
Respondent	)	

MEMORANDUM OF DECISION AND ORDER

The matter before the Court is the petition of John P. McDermott, Jr. for a writ of habeas corpus under 28 U.S.C. §2254. Upon consideration of the petition, the briefs related thereto, the magistrate's report and recommendation and the objections thereto, this Court finds that the petition must be denied and makes the following findings and conclusions in support of its ruling.

The petitioner is currently incarcerated after being convicted by a jury

in the 1980 slaying of Karen Barnes. McDermott has exhausted his state remedies and now seeks relief in this Court on four assignments of error: 1 & 2) Failure of the trial court to instruct the jury on the definition of "voluntariness"; 3) Prosecutorial misconduct; and 4) Failure of the trial court to instruct the jury on a lesser included offense.(1) The matter was referred to Magistrate Perelman who found no error in the record on any of the issues and recommended that

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(1) In his report and recommendation the Magistrate raised a fifth assignment of error not argued by petitioner in his petition, but mentioned in petitioner's brief and raised by petitioner in his appeal to the state courts, namely that it was error to compel the psychiatric examination of petitioner after he had entered a plea of not guilty by reason of insanity. The petitioner has not objected to the Magistrate's finding of no error on this issue and this Court will thus adopt the Magistrate's findings on this assignment of error without further discussion.

this Court[2] deny the petition. The petitioner subsequently filed his objections to the Magistrate's report pursuant to 28 U.S.C. §636(b)(1) and this Court, after having conducted a de novo examination of those portions of the report to which objection was made, makes the following findings.

The petitioner's first objection is to the Magistrate's rejection of his argument that the jury should have been given the definition of a voluntary act contained in Ohio Rev. Code §2901.21(c)(2) as part of the charge on the elements of murder. The Magistrate found, as did the state court of appeals, that "volun-

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(2) This matter was referred to Magistrate Perelman in April of 1983 by Judge Battisti who was then assigned to the case. The Magistrate returned his report to Judge Battisti in September of 1983 and the case was transferred to this Court in April, 1985.

tariness" is not an essential element of the crime of murder with §2901.21 merely codifying the distinction between legal and illegal conduct, and that the law establishing a presumption, rebuttable by the defendant, that every person is responsible for their actions. Thus, the trial court did not err in failing to give the requested instruction. This Court concurs in that conclusion.

The second objection raised by petitioner is that the Magistrate failed to consider his second assignment of error which states that it was a violation of due process not to instruct the jury on the definition of "voluntariness" since it embodied his theory of defense. This Court notes that the Magistrate did consider petitioner's second assignment of error, albeit in conjunction with the first assignment, and is in agreement that there was no violation of due pro-

cess in failing to include an instruction on "voluntariness". The question of a defendant's criminal volition is raised by the defense of insanity and addressed in the charge on that issue. See, Sate v. Howze, 66 Ohio App. 2d 41 (1979).

The petitioner's third objection relates to the finding by the Magistrate that there was no prosecutorial misconduct at the trial which rose to the level of a Constitutional violation. This Court does not find the alleged misconduct so egregious as to render the trial fundamentately [sic] unfair and violative of due process. Angel v. Overberg, 682 F.2d 605 (6th Cir. 1982).

The last objection to the Magistrate's report and recommendation contests the finding that there was insufficient evidence presented at trial to support an instruction on the lesser included offense of voluntary manslaugh-

ter. After a de novo review this Court concurs with the Magistrate and State Appellate Court that the evidence of "heat of passion" was not substantial enough to warrant an instruction on voluntary manslaughter.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that the recommendations of the Magistrate are accepted and adopted in whole except insofar as they may be modified by this order and the petition for writ of habeas corpus is DENIED.

IT IS SO ORDERED.

Dated this 1 day of 29, 1986.

/s/ Alice M. Batchelder
ALICE M. BATCHELDER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN P. McDERMOTT, JR.	)	Case No. C83-65
	)	Magistrate David S.
Plaintiff	)	Perelman
	)	
v.	)	
	)	
E. P. PERINI, SUPT.	)	REPORT & RECOMMENDATION
	)	
Defendant	)	

In this action in habeas corpus, 28 U.S.C. §2254, petitioner attacks his conviction in a jury trial of murder, in violation of Ohio Revised Code §2903.02, upon which he is confined serving a term of 15 years to life.

The instant petition presents four grounds for relief. They may be summarized as: 1) Denial of due process in the giving of an instruction omitting an essential element of the offense of

murder[1]; 2) Prosecutorial misconduct in the cross-examination of defense witnesses; 3) Violation of the Fifth and Sixth Amendments by reason of requiring petitioner to submit to examination by a court-appointed psychiatrist in the absence of counsel and permitting the expert to testify as to statements made by petitioner concerning the crime; 4) and, denial of due process and the right to trial by jury by the refusal of the trial court to charge on the lesser included offense of voluntary manslaughter.

In addition to pleading not guilty, petitioner tendered a plea of not guilty by reason of insanity. The basis of both defenses was overlapping. The theory advanced by the defense was that peti-

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1/ This claim is reflected in both the first and second claims for relief alleged in the petition.

tioner killed the victim[2/] while in the throes of a psychomotor epileptic episode. A neurologist, Dr. Howard Tucker, who testified as a defense expert, stated that he believed that to be the case, and that such conduct could not be considered voluntary but, rather, should be deemed to be "a product of mental disease" and that at the time of the killing petitioner "was unable to make a distinction between right and wrong."[3/]

In advancing his first claim for relief petitioner correctly asserts that a jury instruction which does not include all the essential elements of the crime charged is constitutionally deficient.

2/ The victim was a woman with whom petitioner had a romantic, although apparently rocky, relationship. She was stabbed approximately 30 times with a kitchen knife.

3/ Transcript, pp 717-719. The record has been reviewed in full.

Glenn v. Dollman, 686 F.2d 418 (6th Cir. 1982).

The offense of murder is defined at O.R.C. §2903.02 as "No one shall purposely cause the death of another."

The trial court charged, in pertinent part, as follows:

> The defendant, John P. McDermott, Jr. is charged with murder. By statute, murder is defined as follows:
>
> "No person shall purposely cause the death of another.
>
> Before you can find the defendant guilty of the charge, you must find beyond a reasonable doubt:
>
> 1) That Karen Barnes was a living person and that her death was caused by the defendant in Geauga County, Ohio, on or about the 4th day of November, 1980;
> 2) That the killing was done purposely.
>
> You will note that purpose to kill is an essential element of the crime of murder. A person acts purposely when it is his specific intention to cause a certain result, that is the death of another. It must be established that at the time in

> question there was present in the mind of the defendant a specific intention to cause the death of Karen Barnes.
>
> Purpose is a decision of the mind to do an act with a concious [sic] objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing...

This instruction clearly addresses the essential elements of the crime of murder under O.R.C. §2903.02. It also plainly placed upon the prosecution the burden of proving that the defendant's conduct was volitional, the framework within which one prong of his two-sided contention built upon the theory that the killing was an unknowing product of psychomotor epilepsy was premised.

It must be kept in mind that while the factual predicate for both of defendant's theories was the same they differed in legal import. The concept that the act was unintentional was

presented to the jury under the general plea of not guilty, and put in issue the sufficiency of the prosecution's evidence as to an essential element of the offense. The concept that the act was the product of mental disease put at issue the defendant's sanity, an affirmative defense as to which he carried the burden of persuasion.[4/]

Petitioner's theory that the failure of the trial court to include in the instructions a portion of O.R.C. §2901.21 amounted to constitutional error is without merit. That statute, in perti-

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4/ There is no challenge, as such, to the instructions with regard to the insanity defense. It is noted that as a part of that instruction the trial court charged the jury "If the defendant fails to establish the defense of not guilty by reason of insanity, the state still must prove all the essential elements of the crime charged or any lesser included offense by proof beyond a reasonable doubt."

nent part as relied upon by petitioner, provides:

> (A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:
>
> (1) His liability is based on conduct which includes a voluntary act, ...
>
> (2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.
>
> (C) As used in this section:
>
> (1) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

As held by the Ohio appellate court in rejecting upon direct appeal an assignment of error predicated upon the omission of §2091.21 from the trial court's charge,[5/] this provision, which

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5/ In ascertaining whether the failure to give a requested charge rises to (Footnote Continued)

is a part of the chapter of the Criminal Code entitled "General Provisions", expresses a broad standard delineating criminal and non-criminal conduct, and it is not an essential element of the offense of murder as specifically defined by §2903.02.

Petitioner's second claim for relief is primarily based upon the cross-examination of defense witnesses, Drs. Tucker and Mandel,[6/] although also implicating certain aspects of the examination of Dr. Phillip Resnik, the court-appointed psychiatrist.

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the level of constitutional error the federal courts may look to determinations as to whether the omission of such a charge was proper under state law. Pilon v. Bordenkircher, 593 F.2d 264, 267 (6th Cir. 1979).

6/ Dr. Mandel was a psychiatrist with the Veterans Administration who had treated petitioner since April, 1980 and who had reviewed plaintiff's other VA medical records.

In order to amount to constitutional error prosecutorial misconduct must be so egrigious [sic] as to render the entire trial unfair and a denial of due process. See, Angel v. Overber, 682 F.2d 605, 608 (6th Cir. 1982) and cases cited therein. While perhaps the prosecution overstepped the bounds of propriety on occasion, review of the entire record does not compel the conclusion that the conduct complained of was so outrageous as to totally infect the trial.

Plaintiff's third claim for relief is not argued in the brief in support of the petition. Its parameters are established by the "Supporting FACTS" portion of petitioner's fourth ground in the petition:

> I was compelled by court order to submit to a psychiatric examination over objection by a court-appointed expert in the absence of counsel and to discuss the details of the alleged crime with him. The testimony of the expert

> regarding this compelled examination was subsequently offered against me by the prosecution:
>
> > (1) to prove that my defense of insanity should be rejected and;
> >
> > (2) to prove two of the substantive elements of the offense charged, viz voluntariness and specific intent, beyond a reasonable doubt. This procedure, it is submitted, violated my rights under the Fifth, Sixth and Fourteenth Amendments.

As this Court interprets the foregoing it is susceptible of advancing the claims that being compelled to submit to examination at all, being compelled to submit to examination in the absence of counsel, permitting Dr. Resnick to repeat what petitioner stated as to the crime and permitting Dr. Resnik to offer his opinion on petitioner's mental state were each a violation of petitioner's constitutional rights. If that is so, petitioner's position is incorrect in all respects.

In Estelle v. Smith, 451 U.S. 454 (1981), while the proposition was not directly at issue, the Supreme Court spoke to issue of psychiatric examination ordered by a court in light of a plea of not guilty by reason of insanity, stating:

> When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly several Courts of Appeals have held that, under such circumstances a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. See, e.g., United States v. Cohen, 530 F.2d 43, 47-48 (CA5), cert. denied, 429 U.S. 855 (1976); Karstetter v. Cardwell, 526b F.2d 1144, 1145 (CA9 1975); United States v. Bohle, 445 F.2d 54, 66-67 (CA7 1971); United States v. Weiser, 428 F.2d 932, 936 (CA2 1969), cert. denied, 402 U.S. 949 (1971); United States v. Albright, 388 F.2d 719, 724-725 (CA4 1968); Pope v. United States, 372 F.2d 710, 720-721 (CA8 1967) (en. banc), vacated and remanded on other grounds,

392 U.S. 651 (1968). Id. pp. 465-466.

* * *

> Our holding based on the Fifth and Sixth Amendements [sic] will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute. A defendant may request or consent to a psychiatric examination ... In addition, a different situation arises where a defendant intends to introduce psychiatric evidence ...Id., p. 472.

As in those cases cited by the Supreme Court in Estelle v. Smith which preceded its decision, the lower court rulings since have continued to hold that testimony by a psychiatrist as to statements made by a defendant in the course of an examination occasioned by the entry of an insanity plea violates no constitutional constraints. See, United States v. Madrid, 673 F.2d 1114, 1121 (10th Cir. 1982) and cases cited therein; Battie v. Estelle, 655 F.2d 692, 701 (5th Cir. 1981); Granviel v. Estelle, 655 F.2d 673

(5th Cir. 1981); United States v. Hinckley, 525 F.Supp. 1342, 1349 (D.C. 1981). Based on this view of the controlling law, it must be concluded that petitioner's constitutional rights were not violated by being required to submit to psychiatric examination.

Plaintiff's theory that the absence of counsel at the psychiatric interview renders the statements made by him to the psychiatrist constitutionally infirm under the Sixth Amendment is foreclosed by Noggle v. Marshall, 706 F.2d 1408 (6th Cir. 1983), which holds to the contrary. It must also be observed that the version of the crime which Dr. Resnik testified plaintiff related to him substantially tracked a version which Dr. Tucker had already testified was related to him by petitioner and was essentially exculpatory, rather than inculpatory. Consequently, it would be difficult to find

prejudice in Dr. Resnik's testimony in that regard even if such evidence should not have been received.

The notion that the prosecution was in some way constitutionally prohibited from offering expert testimony going to petitioner's state of mind at the time of the killing, petitioner having put that critical factor at issue and having offered expert evidence of his own probative thereof, is patently absurd.

Petitioner's final claim is based upon the trial court's refusal to charge on voluntary manslaughter as a lesser included offense. That crime is defined by O.R.C. §2903.03 as knowingly causing the death of another "while under the influence of sudden passion or in a sudden fit or rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably

sufficient to incite the person into using deadly force."

The Sixth Circuit Court of Appeals spoke to the question of the failure to give a lesser included offense instruction in Pilon v. Brodenkircher, 593 F.2d 264 (6th Cir. 1979). Tacitly recognizing the general rule that a claim of error is not cognizable in habeas corpus unless of such a magnitude as to constitute denial of a constitutionally protected right, Cupp v. Naughton, 414 U.S. 141, 146 (1973), the court held that "the failure to give a lesser included offense instruction...clearly does not rise to the level of constitutional error where the failure was correct as a matter of state law." Id., p. 267.

In this case the Ohio Court of Appeals determined on direct appeal that the refusal to charge on voluntary man-

slaughter was proper. That determination is entirely correct.

The rule in Ohio is "that no charge as to a lesser included offense need be given unless, in light of the evidence, there are elements of the principal charge which could reasonably be found for the state, and against the defendant, which elements would sustain only a conviction on such lesser included offense." State v. Carver, 30 Ohio St.2d 280, 290 (1970). See, also, State v. Nolton, 19 Ohio St.2d 133, 135 (1969).

The only evidence in this record which is in any manner probative of petitioner's claim that he killed while under a stress response provoked by his victim came through the expert psychiatrists who testified that petitioner told them that all he recalled of the events imediately preceding the homicide was that he and the victim had been arguing

over her alleged infidelity, that she grabbed a knife which he wrested away from her and that she then reached for another knife. Both experts stated that petitioner maintained he had no memory of taking possession of a knife or actually stabbing the victim.

That testimony, marginal at best to support a claim of voluntary manslaughter, is not substantive evidence under Ohio law and is only received in conjunction with the issue of insanity. O.R.C. §2945.40(D), specifically provides "No statement made by a defendant in an examination or hearing relating to his mental condition at the time of an offense shall be used in evidence against him on the issue of guilt in any criminal action."[7/] Plainly, if such testimony is

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7/ The jury was so instructed in the trial court's charge.

incompetent as adverse substantive evidence, self-serving statements made by a defendant in the course of psychiatric examination cannot be utilized as substantive evidence to buttress the defense. Therefore, the trial record contained no substantive evidence which could have supported a conviction of voluntary manslaughter.

It is recommended that the petition be denied without further proceedings.

/s/ David S. Perelman
David S. Perelman
United States Magistrate

DATED: September 6, 1983

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO)	1982 TERM
)	To wit: October 20,
City of Columbus)	1982

State of Ohio,)	
)	No. 82-1226
Appellee,)	
)	**MOTION FOR LEAVE TO**
vs.)	**APPEAL FROM THE**
)	**COURT OF APPEALS**
John P. McDermott,)	
Jr.,)	for GEAUGA County
)	
Appellant.)	

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Burkman [sic], Gordon, Murray & Palda.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ___ day of _____ 19___.

_____Clerk

_____Deputy

COURT OF APPEALS OF OHIO,
ELEVENTH DISTRICT

COUNTY OF GEAUGA

COURT OF APPEALS CASE NO. 973

STATE OF OHIO

Plaintiff-Appellee

-vs-

JOHN P. McDERMOTT, JR.

Defendant-Appellant

OPINION

Decided June 25, 1982

JUDGES:

HON. EDWIN T. HOFSTETTER, P.
HON. ROBERT E. COOK, J.
HON. ALFRED E. DAHLING, J.

APPEARANCES:

CRAIG S. ALBERT
COUNTY PROSECUTOR
219 Main Street
Chardon, OH 44024

ATTORNEY FOR APPELLEE

BERNARD A. BERKMAN
J. MICHAEL MURRAY
LORRAINE R. BAUMGARDNER
2121 The Illuminating Bldg.
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLANT

On November 4, 1980, Karen Barnes died from wounds inflicted by John P. McDermott, Jr., appellant herein. Appellant was indicted for aggravated murder. At his arraignment, appellant entered a plea of not guilty, but later, after granted leave of court, entered pleas of not guilty and not guilty by reason of insanity. Prior to trial, the court ordered mental examinations by Dr. Nancy J. Huntsman and Dr. Phillip J. Resnick as to appellant's mental condition at the time of the offense. Following a jury trial, appellant was found guilty of the lesser included offense of murder and subseqently sentenced.

Appellant has appealed the judgment of the trial court and has filed the following six assignments of error:

> "1. The trial court erred when over objection, it failed to instruct the jury on an essential element of the offense charged, voluntariness as defined by R.C. §2901.21, the very element whose non-existence was the central theory of defense advanced by the appellant.
>
> "2. The trial court erred in overruling objections to and motions for mistrial because of improper cross-examination by the prosecutor of defense witnesses amounting to prosecutorial misconduct which denied appellant a fair trial.
>
> "3. The trial court erred in allowing, over objection, the prosecution's expert to give an opinion on the appellant's sanity in response to a question which did not include the particular facts on which he was being asked to base an opinion, but merely asked him to base his opinion on everything he had reviewed in connection with the case, including voluminous hospital records containing the opinions, conclusions, and inferences of a variety of doctors and other medical personnel.

"4. The trial court erred when, over objection, it failed to instruct the jury on the lesser included offense of voluntary manslaughter under R.C. §2903.03.

"5. The trial court erred in allowing, over objection, two uniformed and armed guards to hover over the appellant during trial.

"6. The trial court erred in requiring the appellant, over objection, to submit to a psychiatric examination in the absence of his counsel, and in admitting into evidence expert testimony based, in part, on statements made by the appellant during that examination."

The assigned errors are without merit.

Appellant first contends the trial court erred when, over objection, it failed to instruct the jury on an essential element of the offense charged, aggravated murder, to-wit: voluntariness, as defined in R.C. 2901.21.

R.C. 2901.21(A) states:

"(A) Except as provided in division (B) of this section, a person is not guilty of an

offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense."

The law presumes every person, who has reached the age of discretion, to be of sufficient capacity to be responsible for crimes. Loeffner v. State (1857), 10 Ohio St. 598. Such a presumption is rebuttable, but the burden is on the defendant to offer evidence tending to rebut the presumption. Where such evidence is presented by the defendant, the issue should be submitted to the jury under proper instructions.

R.C. 2901.21(A) merely codifies the fundamental distinction between criminal conduct on one hand and innocent conduct or accident on the other. Where the

evidence warrants such an instruction, the court should instruct on the issue of the voluntary nature of a defendant's act.

Crim. R. 30 requires a party objecting to a court's instruction to state "specifically the matter to which he objects and the grounds of his objection."

In the cause sub judice, appellant did not object to the court's general charge on the ground the evidence required an instruction as to whether the presumption of criminal responsibility had been overcome. Rather, the appellant objected to the general charge on the ground the court did not include "voluntariness" as an element of the crime charged, aggravated murder.

"Voluntariness" is not an element of the crime of aggravated murder. The elements of said offense are (1) pur-

posely and with prior calculation and design and (2) cause death of another.

We conclude the trial court did not err in failing to instruct the jury "voluntariness" was a necessary element of the crime charged, aggravated murder.

Appellant's second contention is that the court erred in overruling his motion for a mistrial because of improper cross-examination by the prosecutor of defense witnesses.

A mistrial should not be ordered and the jury discharged in a criminal case merely because some error or irregularity has intervened if the substantial rights of the accused or the prosecution are not prejudicially affected thereby.

In the cause sub judice, the prosecutor, during cross-examination of Dr. Howard Tucker, asked Tucker about the prevalence of the defense of psychomotor epilepsy among defendants charged with

murder, the effect on his opinions of testimony to be given by Dr. Garcia that, while Garcia was treating appellant, appellant "never told him about one trance," whether statements given Dr. Tucker by appellant during his mental examination were not self-serving, and whether appellant would kill again if he does not take the drugs prescribed for him. The court sustained an objection to the question concerning whether appellant would kill again if he did not take his medicine.

We conclude such questions, where objections were overruled, were proper cross-examination and, in any event did not constitute error or irregularity which prejudicially affected any substantial right of appellant.

Appellant's third argument is that the trial court erred in allowing, over objection, Dr. Phillip Resnick, a psychi-

atrist, to testify for the prosecution and give his opinion as to whether appellant was sane at the time of the killing. Appellant maintains the prosecutor did not recite particular facts in his question seeking the doctor's opinion.

Evid.R.703 states:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

In the cause sub judice, Dr. Resnick, prior to being asked for his opinion, testified he had reviewed what appellant had told him about the crime, the materials from the Veteran's Administration and the eyewitness account of Greg Barnes.

Evid.R.705 states:

> "The expert may testify in terms of opinion or inference and give his reasons therefor after disclosure of the underlying facts or data. The disclosure may be

in response to a hypothetical question or otherwise."

In the cause sub judice, Dr. Resnick was asked, "Doctor, taking into account everything that you have examined, do you have an opinion as to the defendant's sanity on November 4th, 1980?"

We conclude the question disclosed the underlying facts or data which was to be the basis of Dr. Resnick's opinion and conformed with Evid.R.705.

In his fourth assignment of error, appellant alleges the trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter.

Appellant argues the statements he made during his examination by Dr. Howard Tucker, as testified to by Dr. Tucker, were to the effect that, on the night of the killing, he and the victim got into an argument and each accused the other of

infidelity. After the phone rang and the victim took it off the hook rather than answer it, appellant was sure he was right about the victim. Appellant claimed the victim got a knife and he grabbed it away from her. The victim went for another knife and it was then he killed her although he could not remember doing so, according to appellant's statements to Dr. Tucker.

Appellant contends his statements, of what happened on the evening of November 4, 1980, to Dr. Tucker, constituted evidence that he acted under the influence of sudden passion or in the heat of blood or as a result of some other serious provocation (voluntary manslaughter).

However, appellant's statements to Dr. Tucker were obtained by Dr. Tucker in his examination of appellant to determine

his sanity at the time of the offense, pursuant to R.C. 2945.371.

R.C. 2945.40(D) provides:

> "No statement made by a defendant in an examination or hearing relating to his mental condition at the time of the commission of an offense shall be used in evidence against him on the issue of guilt in any criminal action."

Pursuant to the injunction of R.C. 2945.40(D), the trial court properly instructed the jury:

> "No statement made by the defendant in his examinations relating to his mental condition at the time of the alleged killing, conducted by Dr. Howard Tucker and Dr. Phillip J. Resnick may be used by you to determine the guilt of the defendant."

The statements made by appellant to Dr. Tucker, as to the events of the evening of November 4, 1980, were not evidence for the court to consider in determining what instructions to give the jury on the crime charged or included offenses. Since there was no other

evidence of any passion, hot blood or serious provocation, appellant not having taken the stand, the trial court did not err in refusing to instruct the jury on the lesser included offense of voluntary manslaughter.

In appellant's fifth assignment of error, he argues he was denied due process of law by the presence, during trial, and within the view of the jury, of two uniformed and armed guards near appellant.

The amount and type of security in a courtroom during a trial of a criminal case is generally within the sound discretion of the trial court. State v. Carter (1977), 53 Ohio App.2d 125; McCloskey v. Boslow (4th Cr. 1965), 349 F.2d 119. Absent a clear showing of denial of a fair trial, the trial court's determination should not be reversed.

State v. Perod (1968), 15 Ohio App. 2d 115, 120.

In the cause sub judice, appellant was charged with aggravated murder and had entered a plea of "not guilty by reason of insanity," as well as a plea of "not guilty." Apparently, there is no claim he was handcuffed or restrained in any way or not brought into the courtroom clad in civilian clothes. The courtroom was small and not much distance separated the jury, spectators and appellant.

We conclude the trial court did not abuse its discretion in allowing the two guards to remain near appellant during his trial and during recesses. We further conclude appellant was not denied due process by their presence. A jury knows that the presence of police officers in a courtroom near a defendant in a criminal trial is not unusual.

Nothing in the instant record reflects any denial of due process to appellant.

In his last assignment of error, appellant asserts the court's requiring appellant to submit to a psychiatric examination violated his Fifth, Sixth and Fourteenth Amendment rights because his counsel was not permitted to accompany him. Appellant also argues the prosecution violated appellant's Fifth Amendment rights by Dr. Resnick's testimony as to the statements made to him during his examination of appellant as to his sanity at the time of the killing. Use of such statements to prove guilt of a defendant is prohibited by R.C. 2945.40(D).

It has been held that a defendant who interposes a defense of insanity may be required to submit to a psychiatric examination without his lawyer being present without violating his Fifth and Sixth Amendment rights. United States v.

Cohen (5th Cir. 1976), 530 F.2d 43, 47-48; United States v. Bohle (7th Cir. 1971), 445 F.2d 43, 66-67; Karstetter v. Cardwell (9th Cir. 1976), 526 F.2d 1144.

As to Dr. Resnick testifying as to statements made to him by appellant during his mental examination, Resnick testified on rebuttal after Dr. Tucker had testified for appellant as to statements appellant had made to him during his mental examination of appellant.

If a defendant offers psychiatric testimony obtained during an examination to determine his sanity, such testimony constitutes a waiver of his Fifth Amendment privilege in the same manner as if he had elected to testify at the trial. United States v. Cohen (5th Cir. 1976), 530 F.2d 43.

We conclude appellant's constitutional rights were not violated by the

court's refusal to allow appellant's counsel to accompany him for his mental examinations or by Dr. Resnick's rebuttal testimony.

Judgment affirmed.

/s/ Robert E. Cook
JUDGE ROBERT E. COOK

HOFSTETTER, P.J.,

DAHLING, J., concur.

STATE OF OHIO)
) SS.
COUNTY OF GEAUGA)

IN THE COURT
OF APPEALS
ELEVENTH DISTRICT

CASE NO. 973

STATE OF OHIO,

Appellee

-vs-

JOHN P. McDERMOTT, JR.,

Appellant

JUDGMENT ENTRY

Filed June 25, 1982

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the

Court and disposed of as set forth in this Court's Opinion, which is incorporated herein by reference.

It is ordered that the costs shall be taxed against the appellant.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ Robert E. Cook
JUDGE ROBERT E. COOK

FOR THE COURT

IN THE COURT OF COMMON PLEAS
GEAGUA COUNTY, OHIO

STATE OF OHIO	)	CASE NO. 80-C-1168
	)	
Plaintiff	)	JUDGE: HANS R. VEIT
	)	
-vs-	)	
	)	
JOHN McDERMOTT	)	JUDGMENT OF
	)	CONVICTION
Defendant	)	

This cause came on for sentencing on the 21st day of May, 1981, the defendant being present in court with his counsel, J. Michael Murray, the State of Ohio being represented by Bruce A. Hutton, Assistant Prosecuting Attorney.

The defendant was found Guilty of a violation of §2903.02 of the Revised Code, Murder) by a jury on March 31, 1981, and a pre-sentence investigation report was ordered.

Upon due consideration of the factors on sentencing at Revised Code 2929.12, review of the pre-sentence report and the prosecutor's recommen-

dation, the defendant was sentenced to the Ohio State Penitentiary for 15 Yrs to Life.

The court advised the defendant of his rights regarding appeal, including his right to be represented by counsel.

The defendant was then remanded to the custody of the Sheriff of Geauga County who is to transport the defendant to the Ohio Correctional, Medical Reception Center forthwith.

IT IS SO ORDERED.

/s/ Hans R. Veit
HANS R. VEIT, JUDGE

APPROVED:

/s/ Bruce A. Hutton
Bruce A. Hutton
Assistant Prosecuting Attorney

CONSTITUTION OF UNITED STATES

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTON OF UNITED STATES

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

OHIO REVISED CODE

Section 2901.21

Culpable Mental States

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) When the section defining an offense does not specify any degree of culpability and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not

required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

(C) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have ended his possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

OHIO REVISED CODE

Section 2903.01

Aggravated Murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the

death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or

violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is non-conclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

OHIO REVISED CODE

Section 2903.02

Murder

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

OHIO REVISED CODE

Section 2903.03

Voluntary Manslaughter

(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious prevocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, an aggravated felony of the first degree.